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ATTORNEYS FOR APPELLEE:

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**IN THE
COURT OF APPEALS OF INDIANA**

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No. 72A01-0712-CR-553

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August 25, 3008

BAKER, Chief Judge

Appellant-defendant Thomas J. Stamey appeals his convictions for Reckless Homicide,¹ a class C felony, and Battery Resulting in Death of a Person Less than Fourteen Years of Age,² a class A felony. Specifically, Stamey argues that his convictions must be reversed because the trial court improperly admitted his confession into evidence. Stamey also contends that the trial court's imposition of the maximum sentence on each conviction was not warranted when considering the nature of the offenses and his character.

Although we find that Stamey does not prevail on his claims of error, we sua sponte observe that the conviction and sentence for reckless homicide cannot stand because it is a lesser-included offense of the battery charge. Thus, we affirm in part, reverse in part, and remand with instructions that the trial court vacate Stamey's conviction and sentence for reckless homicide.

FACTS

L.R., who was born on February 12, 2003, lived with her mother, Angela Beard, Stamey, and a younger half-brother in Scottsburg. On May 10, 2005, at approximately 5:45 a.m., Beard left the house to go to her job at an Arby's restaurant. At 7:30 a.m., Stamey called Beard and told her to come home as quickly as possible. When Beard arrived, she found L.R. lying unconscious on the floor with Stamey kneeling over her. Beard attempted to administer CPR while Stamey called for an ambulance.

¹ Ind. Code § 35-42-1-5.

² I.C. § 35-42-2-1(a)(M)(5).

When the paramedics arrived, they observed L.R. lying lifeless on the floor. Although one of the technicians performed CPR on L.R., the procedure was not successful. Thereafter, L.R. was transported to Scott Memorial Hospital (the hospital). L.R. arrived at the hospital in respiratory and cardiac arrest. Efforts to revive L.R. were unsuccessful and she was pronounced dead at 8:20 a.m. The emergency room physician did not notice any significant injuries on L.R.'s body.

Scottsburg Police Officer Mike Nichols was at the residence and Stamey asked Officer Nichols to drive him to the hospital. On the way, Stamey told Officer Nichols that he had found L.R. face down on the bed and not breathing. Stamey stated that he picked up L.R. and ran towards the living room. Stamey also said that he tripped over an electrical cord but did not drop L.R.

Forensic pathologist Donna Stewart performed the autopsy on L.R. and observed blunt-force trauma to L.R.'s head and vaginal area. Dr. Stewart also found evidence that L.R. may have been asphyxiated, and she noticed subdural hemorrhaging, cerebral edema, and injuries to L.R.'s stomach and intestines. As a result of the examination, Dr. Stewart determined that L.R. died from multiple injuries secondary to a physical assault that included asphyxiation injuries, blunt force head injuries, and blunt force trunk injuries. Consequently, Dr. Stewart ruled L.R.'s death a homicide.

The day after L.R. died, Scottsburg Police Captain Robert Amick stopped Beard and Stamey as they were walking to Walmart. Both agreed to accompany Captain Amick to the police station. When they arrived, no one told Stamey or Beard that they could not leave or were under arrest. Beard believed that she could leave at any time. Once in the

interview room, Beard was given a waiver of rights form, which she read, understood, and signed. During the interview, the police officers informed Beard that L.R. died from asphyxiation and had sustained blunt force trauma to her head and vaginal area.

Beard became upset and went outside to smoke a cigarette. While Beard was outside, the police interviewed Stamey. Prior to questioning, Stamey was given a waiver of rights form. Stamey acknowledged that he could read and write. After reading the form, Stamey signed it and specifically told the police officers that he did not have any questions about waiving his rights. During the interview, which was partially taped, Stamey told the police officers that he had entered L.R.'s room to change her diaper. Stamey said that L.R. immediately became upset and began to kick and scream. As a result, Stamey held L.R. down and placed his hand over her mouth until she went limp and her face turned blue. Stamey then told the officers that he picked up L.R., ran into the living room, and called Beard at work. Stamey further explained that L.R. might have received head injuries when she was kicking and screaming and trying to get away from him. He also stated that L.R. may have sustained the vaginal injuries when he "tried to wipe [her] in a rough manner." Tr. p. 515-16, 820.

After making these statements, Stamey asked the officers if he could call his mother. Stamey talked with his mother and told her that he had "hurt the baby." Id. at 821. Stamey also told her that he had put his hand over L.R.'s mouth, that he told the police "everything," that he was going to prison, and that he wanted to die. Id. Thereafter, Stamey apologized to Beard and stated that he did not mean to hurt L.R.

Stamey also denied molesting L.R. The police officers then handcuffed Stamey and placed him under arrest.

The State charged Stamey with murder, felony murder, class A felony battery resulting in death, and class A felony child molesting. Stamey subsequently filed a motion to suppress the statements that he made to the police officers on May 11, 2005, claiming that he did not voluntarily, knowingly, and intelligently waive his rights pursuant to Miranda v. Arizona.³ The trial court denied Stamey's motion to suppress, and following a jury trial that commenced on September 4, 2007, Stamey was convicted of reckless homicide, as a lesser-included offense of murder, and class A felony battery.

At the sentencing hearing, the trial court identified the following aggravating factors: (1) Stamey's criminal history; (2) L.R.'s age; (3) Stamey was on conditional release when he committed the instant offenses; and (4) Stamey was in a position of trust with L.R. The trial court found no mitigating factors and sentenced Stamey to eight years for reckless homicide and fifty years on the class A felony battery conviction, to be served concurrently. Stamey now appeals.

DISCUSSION AND DECISION

I. Pretrial Statements

Stamey contends that his convictions must be reversed because the trial court erred in admitting the statements that he made to the Scottsburg Police officers. Specifically, Stamey argues that the statements should not have been admitted into evidence because

³ 384 U.S. 436 (1966).

the totality of the circumstances established that his purported waiver of rights under Miranda was not voluntary, knowing, or intelligent.

In resolving this issue, we initially observe that the trial court has broad discretion in ruling on the admissibility of evidence. Washington v. State, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). Therefore, we will not reverse the trial court's decision to admit Stamey's statements absent an abuse of discretion. Ringo v. State, 736 N.E.2d 1209, 1211 (Ind. 2000). An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. Washington, 784 N.E.2d at 587.

The Fifth and Fourteenth Amendments to the United States Constitution as well as Article I, Section 14 of the Indiana Constitution guarantee a defendant's right against self-incrimination. Malinski v. State, 794 N.E.2d 1071, 1076 (Ind. 2003). The amendments also afford the defendant the right to remain silent and to be represented by counsel. Id. Moreover, in Miranda, the United States Supreme Court determined that a defendant may waive these rights so long as the waiver is made voluntarily, knowingly, and intelligently. 384 U.S. at 444. However, a defendant is entitled to the procedural safeguards of Miranda only if he or she is subject to custodial interrogation. Lawson v. State, 803 N.E.2d 237, 239 (Ind. Ct. App. 2004).

We also note that when a defendant challenges the admissibility of a confession, the State must prove beyond a reasonable doubt that the confession was given voluntarily. Jackson v. State, 735 N.E.2d 1146, 1154 (Ind. 2000). Upon review, we examine the totality of the circumstances surrounding the defendant's waiver or

confession. Id. The focus is whether the waiver or confession was free and voluntary and not induced by any violence, threats, promises, or other improper influences. Id. Put another way, a statement is voluntary if, in light of the totality of the circumstances, the confession is the product of a rational intellect and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics that have overcome the defendant's free will. Crain v. State, 736 N.E.2d 1223, 1231 (Ind. 2000).

When considering the admissibility of a confession on appeal, we will uphold the finding of the trial court if there is substantial evidence of probative value to support it. Jackson, 735 N.E.2d at 1153-54. The factors that we examine in evaluating the voluntariness of a defendant's confession include the presence of police coercion, the length of the interrogation, its location, continuity, and the defendant's maturity, education, physical condition, and mental health. State v. Keller, 845 N.E.2d 154, 165 (Ind. Ct. App. 2006), trans. denied.

In this case, the evidence demonstrated that Stamey and Beard agreed to accompany Captain Amick to the police station. Tr. p. 420-22, 1144, 1204. Beard thought that she and Stamey could "leave any time" during the interviews, and she left the room after being informed of the cause of death. Id. at 424, 494. When Stamey was interviewed, he sat near an unlocked door, and the evidence established that he could have left the police station at any time prior to his confession. Id. at 1165, 1167-68, 1200. Stamey was detained and handcuffed only after he confessed to the crimes. Id. at 1144, 1204. Therefore, Stamey was not in custody when the police officers questioned him and the safeguards set forth in Miranda did not apply.

However, even assuming for the sake of argument that that Stamey was subjected to custodial interrogation, the evidence established that Stamey told Officer Nichols that he could read and write. Ex. 51. Stamey was then given a waiver of rights form that he reviewed and signed. Stamey specifically told the officers that he did not have any questions about the form and his rights. Tr. p. 1168-69, 1201.

The police officers observed that Stamey did not appear confused or intoxicated. Id. at 1173-74. Although the audiotape does not contain the entire interview, there is absolutely no evidence of any violence, threats, promises, or other improper influences on the part of the officers. Captain Amick testified that the interview lasted less than one hour, and the portion that was taped is forty-seven minutes long. Id. at 1187.

In essence, Stamey does not direct us to any specific instance that had a bearing on his ability to waive his Miranda rights or to give a knowing and voluntary statement. Therefore, it is apparent that the State proved that Stamey's confession and waiver were voluntary and we conclude that the trial court did not err in admitting his statements at trial.

II. Lesser-Included Offense

Before proceeding to Stamey's second claim of error regarding the propriety of his sentences, we sua sponte observe that Stamey's dual convictions for reckless homicide and battery cannot stand.

In this case, the informations charging Stamey with class A felony battery and murder provided as follows:

MURDER

[o]n or about the 10th day of May, 2005 at or near Michael Drive, in Scottsburg, . . . THOMAS J. STAMEY did knowingly or intentionally kill another human being, to-wit: [L.R.] by means of blunt force head injury and/or asphyxia.

BATTERY

[o]n or about the 10th day of May, 2005 at or near Michael Drive, in Scottsburg, . . . THOMAS J. STAMEY, being a person at least eighteen (18) years of age, did knowingly or intentionally touch another person under the age of fourteen, to-wit: [L.R.] age 2, in a rude, insolent, or angry manner resulting in the death of [L.R.], by blunt force head injury and/or asphyxia, resulting in her death.

Appellant's App. p. 180-81.

As discussed above, the jury found Stamey guilty of reckless homicide, which is a lesser-included offense of murder. Garrett v. State, 756 N.E.2d 523, 528 (Ind. Ct. App. 2001). Similarly, because Stamey's act of battery upon L.R. resulted in her death, he cannot also be convicted of reckless homicide for that same death. See Pinkston v. State, 821 N.E.2d 830, 839 (Ind. Ct. App. 2004) (holding that if the only feature distinguishing the alleged lesser-included offense from the crime charged is that a lesser culpability is required to establish the commission of the lesser offense, then the alleged lesser-included offense is inherently included in the crime charged). Thus, Indiana Code section 35-38-1-6 controls, which provides that where a defendant is found guilty of both a greater and a lesser-included offense, judgment and sentence may not be entered on the lesser-included offense. As a result, we must remand this case with instructions that the trial court vacate Stamey's conviction and sentence for reckless homicide.

III. Sentencing

Finally, Stamey next contends that he was improperly sentenced. Specifically, Stamey argues that the maximum sentences⁴ must be set aside because he is not among the worst offenders when considering the nature of the offenses and his character. Because we have concluded that Stamey's conviction and sentence for reckless homicide must be vacated, we need only address the propriety of the fifty-year sentence that was imposed on the battery count.

We initially observe that sentencing decisions are within the trial court's discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), reh'g granted on other grounds, 875 N.E.2d 218 (Ind. 2007). As long as the sentence imposed is within the statutory range, the trial court's sentencing determination will be reversed only for an abuse of discretion. Id. An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. Id.

However, this court has the constitutional authority to revise an otherwise proper sentence where, after due consideration of the trial court's sentencing determination, we find that the sentence imposed is inappropriate in light of the nature of the offense and the defendant's character. Ind. Appellate Rule 7(B). The defendant carries the burden to convince us that the sentence imposed is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

⁴ In accordance with Indiana Code section 35-50-2-4, the penalty range for a class A felony is a fixed term between twenty and fifty years, with the advisory sentence being thirty years. The sentencing range for a class C felony is a fixed term between two and eight years, with an advisory sentence of four years. I.C. § 35-50-2-6.

Although maximum sentences should generally be reserved for the worst offenses and offenders, Bacher v. State, 686 N.E.2d 791, 802 (Ind. 1997), this court has explained that

If we were to take this language literally, we would reserve the maximum punishment for only the single most heinous offense. . . . We should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character.

Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002).

Regarding the nature of the offense, the record shows that twenty-three-year-old Stamey killed his two-year-old stepdaughter, L.R., who had been entrusted to his care. In our view, Stamey's "nature of the offense" argument does not aid his inappropriateness claim.

As for Stamey's character, the record shows that he accumulated juvenile adjudications for possession of marijuana, cultivating marijuana, and possession of paraphernalia. Appellant's App. p. 708. As an adult, Stamey was convicted of terroristic threatening, menacing, and assault in Kentucky in 2004. Id. Moreover, those convictions occurred less than six months before Stamey committed the instant offenses, and he violated the terms of his conditional release that required him to refrain from offensive or criminal behavior. Id. Rather than availing himself of the opportunity to rehabilitate himself, Stamey chose to commit additional crimes that culminated in the death of L.R. More particularly, the evidence established that Stamey suffocated L.R. when Beard was not at the house. Obviously, Stamey's past contacts with the judicial system have not

deterred him from criminal activity. In light of these circumstances, we cannot say that the maximum sentence was inappropriate in light of the nature of the offense and Stamey's character.

The judgment is affirmed in part, reversed in part, and this cause is remanded with instructions that the trial court vacate Stamey's conviction and sentence for reckless homicide.

MATHIAS, J., and BROWN, J., concur.